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No. 84-1439

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CAROL C. JOHNSON,

Petitioner,

v.

BRANFORD ZONING BOARD OF APPEALS,
WALTER KRESKE and ANNETTE KRESKE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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STATEMENT OF THE CASE

This petition for certiorari represents this pro se plaintiff's latest maneuver in almost 20 years of continuous litigation arising out of a zoning dispute between residential neighbors.

The facts, as set forth in the Appellate Court's decision (App. pp. A8-A8.2), may be summarized briefly. The Branford, Connecticut, Zoning Board of Appeals granted a variance of 11% of the bulk area ratio to cover an already built addition to the Kreskes' house. The petitioner, pro se, appealed that decision. While the action was pending, the Branford Planning and Zoning Commission, in 1973, undertook an extensive revision of the entire zoning ordinance and increased the floor area ratio in the zone in question to 50% of the lot area. As a result, the size

of :e Kreskes' house was permitted as a matter of right, and therefore no variance was necessary.

The Trial Court therefore dismissed this appeal as being moot. (App. p. A14) Petitioner appealed that decision, and it was placed on the calendar of the Connecticut Supreme Court.

In 1982, while this case was pending in the Connecticut Supreme Court, Section 1 of Article Fifth of the Connecticut Constitution was amended to establish an Appellate Court, beneath the Supreme Court. Thereafter, the Connecticut Legislature passed the necessary legislation to establish the Appellate Court. P.A. Spec. Secs. June 1983, No. 83-29, Sec. 3, codified as C.G.S. Sec. 51-197a. As part of that legislation, the Supreme Court was authorized to shift a portion of its work load to the newly formed Appellate Court, so that this new court would not be sitting for months without cases ready to provide business, while the Supreme Court's load remained unabated. P.A., Spec. Sess. June 1983, No. 83-29, Sec. 2 (c), codified as C.G.S. Sec. 51-199(c) (Resp. App. p. 3a). A procedure was established to provide for certification to the Supreme Court of important issues after a hearing and decision by the Appellate Court, a procedure not unlike the certiorari provisions of this court. P.A. Spec. Sess. June 1983, No. 83-29, Sec. 7, codified as C.G.S. Sec. 51-597f (Resp. App. p. 2a).

On December 15, 1983, the Connecticut Supreme Court transferred this case to the Appellate Court. (App. p. A10). The petitioner filed a motion at that time requesting the Supreme Court to recall the case from the Appellate Court (App. pp. A9.1-A9.2), but the motion was denied. (App. p. A9). No petition for writ of certiorari was filed in the United States Supreme Court by petitioner at that time.

This case was then briefed and orally argued before the Appellate Court on the merits, which sustained the decision of the trial court. (App. pp. A8-A8.2).

Petitioner thereafter applied to the Connecticut Supreme Court for certification from the Appellate Court (App. pp. A6-A6.1), briefs were filed by all parties, and the Connecticut Supreme Court, on September 27, 1984, denied the Petition for

Certification. (App. p. A5). Thereafter, the petitioner filed other motions in the Connecticut Supreme Court, reprinted in his brief, (App. p. A4) which were dismissed. (App. p. A3).

Petitioner has now filed this petition for a writ of certiorari in this court finally seeking review of the issue resolved against him in December, 1983.

SUMMARY OF ARGUMENT

A. The Connecticut legislature did not violate Petitioner's Due Process rights, when it established an intermediate appellate court and authorized the Connecticut Supreme Court to transfer pending cases thereto.

B. The petitioner did not give the Connecticut courts a sufficient opportunity to consider this issue affecting their jurisdiction.

C. The petitioner did not file this petition in a timely fashion.

ARGUMENT

A. *This Case Raises No Substantial Federal Question. Accordingly, Certiorari Is Not Appropriate.*

Although not limiting the discretion of this Court, the considerations governing the granting of a writ of certiorari are set forth in Supreme Court Rule 17. None of those provisions provides any basis for granting this petitioner's request. Petitioner raises no conflict between any federal or state courts on the issues presented. See Rule 17.1(a) and (b). Nor is there is any unsettled issue of Federal law or action by the Connecticut Supreme Court which violates any prior decision of this Court. See Rule 17.1(c).

Plaintiff's sole claim is that the change in the jurisdiction of the Connecticut Supreme Court, which resulted in the transfer of his case, violated his due process rights. For well over a hundred years, the decisions of this Court have uniformly upheld the rights of legislatures to remove jurisdiction from a court, even

this Court itself. Thus, in *Ex Parte McCardle*, 7 Wall (74 U.S.) 506 (1868) and *Railroad Co. v. Grant*, 8 Otto (98 U.S.) 398 (1878), this Court dismissed appeals already pending before it, where Congress, during the pendency of those appeals, removed the Supreme Court's jurisdiction over the issues raised.[1] Accord, *Railroad Company v. Trook*, 10 Otto (100 U.S.) 112 (1879); *Dennison v. Alexander*, 80 Otto (103 U.S.) 522 (1880).

More recently, this Court has upheld the dismissal of a case in the District Court, where, after that case was filed, the jurisdictional legislation was amended to transfer from the District Court to the Court of Claims Tucker Act actions brought by certain federal employees, including plaintiff in that case, *Bruner v. United States*, 343 U.S. 112 (1952).

In summary, the sole question raised in this petition is one which has been resolved against petitioner in numerous cases decided over the space of a century, by decisions which have consistently rejected petitioner's claim. There is no need, in an age when courts must consider new methods for dealing with overcrowded dockets, see e.g. Burger, C.J., "Annual Report on the State of the Judiciary", as reported at 69 A.B.A. Journal 442, 446-47 (April, 1983), to discourage experimentation, by granting yet one more reconsideration of the hoary issue raised here.

B. *The Record Below Does Not Justify Granting of Certiorari.*

The granting of certiorari is an extraordinary remedy which is used only sparingly by this Court. See *Fay v. Noia*, 372 U.S. 391, 436 (1963). One of the factors to be considered in exercising this discretion is whether the issue which this Court is asked to consider is brought to it with a full record and adequate consideration by the court below. *Bacchus Imports, Ltd. v. Dias*, U.S. , 104 S.Ct. 3049, 3059 (1984); *Ellis v. Dixon*, 349 U.S. 458 (1955). This is particularly true where the federal issues raised are closely intertwined with state rules of

[1] In *Ex Parte McCardle*, this Court had even been subjected to four days of oral argument before its jurisdiction was dislodged. 7 Wall (74 U.S.) at 508.

procedure, *Duncan v. Tennessee*, 405 U.S. 127 (1972), for " 'due regard for the appropriate relationship of this Court to state courts . . .' demands that these courts be given an opportunity to consider the constitutionality of the actions of state officials . . . ," *Illinois v. Gates*, U.S. , , 103 S.Ct. 2317, 2323 (1983).

In this case, the constitutional issue of which the petitioner seeks consideration was raised only in passing by him below. Only in a motion for reconsideration (App. p. A9.2) and his petition for certification to the State Supreme Court (App. p. A6.1), both of which were decided without full briefs or oral argument, did petitioner address this major attack on the state's readjustment of its appellate jurisdiction. Even there he gave it only passing attention, limiting his arguments to a single paragraph in a scattershot application, raising numerous issues. In the Appellate Court, where full briefs were filed, oral argument heard, and a full hearing available, petitioner never raised the claim.

C. *The Petition Was Not Filed in a Timely Fashion.*

The petitioner has waited until the allegedly unconstitutional system had been in effect for a year-and-a-half before raising his objection to this Court. Had he been serious about either the merits of his constitutional claim or his contention that delay in consideration of his claim by the Connecticut Supreme was prejudicial, petitioner should have filed for certiorari with this Court after the granting, on December 15, 1983 (App. p. A16), of the transfer which he seeks to challenge. See *Monks v. New Jersey*, 398 U.S. 71 (1970) (12 year delay in bringing petition). The 90-day provisions of 28 U.S.C. Sec. 2101(c) are designed to assure speedy consideration of issues by this Court. That section requires review within ninety days after the entry of the challenged decree. Here petitioner seeks review of the transfer dated December 15, 1983. Accordingly, this petition, to be timely was due on March 15, 1984.

On this sparse record and untimely filing, it would be improvident for this Court to consider an issue which could impact not

only the entire Connecticut judicial scheme, but any other federal or state procedure implementing a new tier of appellate courts.

CONCLUSION

This petition for a writ of certiorari raises only one issue—an issue which minimal research (see Petr's. Br. p. v) would have demonstrated to this pro se petitioner has been foreclosed for over a hundred years. It is time for twenty-one years of litigation over petitioner's neighbors' carport to an end.

The petition for a writ of certiorari to the Connecticut Supreme Court should be denied.

RESPECTFULLY SUBMITTED

BRANFORD BOARD OF ZONING APPEALS,

By:

David A. Reif
Its Attorney

ANNETTE KRESKE,

By:

John W. Colleran
Her Attorney

WALTER KRESKE,

PRO SE,

RESPONDENT'S APPENDIX

P.A. Spec. Sess. June 1983, No. 83-29,
Sec. 3, codified as C.G.S. Sec. 51-197a

(a) Appeals from final judgments or actions of the superior court shall be taken to the appellate court in accordance with section 51-197c, except for small claims, which are not appealable, appeals within the jurisdiction of the supreme court as provided for in section 51-199, appeals as provided for in section 8-8, section 8-9, section 8-28 and section 8-30, and except as otherwise provided by statute.

(b) The appellate court may issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to the usages and principles of law.

(c) All matters pending in the appellate session of the superior court on July 1, 1983 shall be construed as pending with the same status in the appellate court on said date.

(d) Nowithstanding subsection (c) of this section, the appellate session of the superior court shall continue to have jurisdiction over appeals which it heard prior to July 1, 1983, pursuant to the provisions which were applicable at such time.

(e) Except as otherwise provided in public act 83-29, June Special Session, all jurisdiction conferred upon and exercised by the appellate session prior to July 1, 1983 of the superior court shall be transferred to the appellate court.

P.A. Spec. Sess. June 1983, No. 83-29.
Sec. 7, codified as C.G.S. Sec. 51-197f

Upon final determination of any appeal by the appellate court, there shall be no right to further review except the supreme court shall have the power to certify cases for its review upon petition by an aggrieved party or by the appellate panel which heard the matter and upon the vote of two justices of the supreme court so to certify and under such other rules as the justices of the supreme court shall establish. The procedure on appeal from the appellate court to the supreme court shall, except as otherwise provided, be in accordance with the procedure provided by rule or law for the appeal of judgments rendered by the superior court, unless modified by rule of the justices of the supreme court.

C.G.S. Sec. 51-199, including P.A. Spec. Sess. June 1983, No. 83-29, Sec. 2(c) codified as 51-199(c)

(a) The supreme court shall have final and conclusive jurisdiction of all matters brought before it according to law, and may carry into execution all its judgments and decrees and institute rules of practice and procedure as to matters before it.

(b) The following matters shall be taken directly to the supreme court: (1) any matter brought pursuant to the original jurisdiction of the supreme court under section 2 of article sixteen of the amendments to the constitution; (2) an appeal in any matter where the superior court declares invalid a state statute or a provision of the state constitution; (3) an appeal in any criminal action involving a conviction for a capital felony, class A felony, or other felony, including any persistent offender status, for which the maximum sentence which may be imposed exceeds twenty years; (4) review of a sentence of death pursuant to section 53a-46b; (5) any election or primary dispute brought to the supreme court pursuant to section 9-323 or section 9-325; (6) an appeal of any reprimand or censure of a probate judge, pursuant to section 45-11g; (7) any matter regarding judicial removal or suspension pursuant to section 51-51j; (8) an appeal of any decision of the judicial review council pursuant to section 51-51r; (9) any matter brought to the supreme court pursuant to section 52-265a; (10) writs of error, pursuant to section 52-272; and (11) any other matter as provided by law.

(c) The supreme court may transfer to itself a cause in the appellate court. Except for any matter brought pursuant to its original jurisdiction under section 2 of article sixteen of the amendments to the constitution, the supreme court may transfer a cause or class of causes from itself, including any cause or class of causes pending on July 1, 1983, to the appellate court. The court to which a cause is transferred has jurisdiction.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

United States Supreme Court Rule 17.1

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut Constitution
Article Fifth, Section 1

The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.